Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JOHN KNOX WALKUP, Attorney General of the State of Tennessee, *et al.*,

Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, *et al.*,

Respondents,

SHELBY COUNTY BOARD OF EDUCATION, *et al.*,

Intervenor Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS HERMAN COX, *et al.*

LEWIS R. DONELSON
Counsel of Record
ROBERT MARK GLOVER
BAKER, DONELSON, BEARMAN & CALDWELL
Attorneys for Intervenor Respondents Herman Cox, et al.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000

144094

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals erred in holding that the election provisions of Tennessee's Education Improvement Act ("EIA"), as applied in Shelby County, Tennessee, violate the rights of voters in the Shelby County School District under the Fourteenth Amendment to the United States Constitution by allowing out-of-district voters with no substantial interest to vote in county school board elections under circumstances in which the votes of the out-of-district voters would not only dilute, but would overwhelm the votes of voters residing in the district.

PARTIES TO THE PROCEEDING

In accordance with Rule 24(b) of the Supreme Court Rules, Intervenor-Respondents expand upon the description of the parties in the Petition by stating that Herman Cox, individually and as Mayor of the City of Collierville; Gene Fletcher, individually and as Mayor of the City of Lakeland; Bobby Flaherty, individually and as Mayor of the City of Bartlett; Sharon Goldsworthy, individually and as Mayor of the City of Germantown; and George Harvell, individually and as Mayor of the City of Arlington, all of which municipalities are within Shelby County, Tennessee, were allowed to intervene in the trial court and have participated as plaintiffs and appellees throughout the proceedings below. They submit this Response in Opposition to Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate in most respects, but fails to present a balanced statement of the proof. For a more comprehensive statement of relevant facts, this Respondent refers to and incorporates by reference the factual statement contained in the Response in Opposition to Petition for Writ of Certiorari filed by the Board of County Commissioners of Shelby County, Tennessee. The Petitioner's Statement of the Case incorrectly implies that Article XI, § 17 of the Tennessee Constitution contains a provision explicitly dealing with the election of county school board members (Pet. at 4), when it actually addresses only "county office(s) created by the Legislature," without defining "county office." In addition, in discussing the holding of the Court of Appeals for the Sixth Circuit, the Petitioner briefly touches upon the Sixth Circuit's previous decision in *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995) and the "substantial interest" test applied in cases challenging the county-wide election of rural county school boards. (Pet. at 5-6). In discussing the four primary factors utilized in *Duncan* for determining whether out-of-district voters have a "substantial" interest in the case now at issue, Petitioner incorrectly implies that the Sixth Circuit found that only two of the four factors favored Respondents (Pet. at 6) when, in fact, at least three of the four factors were found to be in Respondents' favor and the fourth was inconclusive at best. (Pet., Appendix at 15-17).

The District Court and the Sixth Circuit ruled that the plan of districting and election adopted by the Shelby County Commission, which includes seven (7) districts covering the entire area of the county, including areas not served by the Shelby County School District, would deny the citizens living in the geographic area served by the Shelby County School District equal protection of the laws. This decision was based upon the

particular facts of this case, including the fact that under the plan held unconstitutional by the Sixth Circuit, voters residing outside of the area served by the Shelby County School Board would have constituted a majority of the registered voters in six (6) of the seven (7) districts established, and would have constituted an *overwhelming* majority of voters in more than half of those districts. (Pet., Appendix at 15). Moreover in one district, there would be no residents of the geographic area served by the Shelby County School Board.

Petitioner fails to mention that the Tennessee state legislature adopted an amendment to Tenn. Code Ann. § 49-2-201(c) (a part of the E.I.A)., which provides that in counties having a specified population, currently applicable only to Shelby County, candidates elected to the school board serving the county school system must be residents of the geographic area served by the Shelby County School Board. Thus, no residents of one of the voting districts established by the plan would be eligible to serve on the Board. At the time of the hearing in the District Court, the issue of the constitutionality of Tenn. Code Ann. § 49-2-201(c) was before the Tennessee courts. Since that time the Tennessee Court of Appeals has held that provision to be constitutional and the Tennessee Supreme Court has denied the State's Application for Permission to Appeal. *Shelby County, et al. v. McWherter*, 936 S.W. 2d 923, 934-36 (Tenn. App. 1996), appeal denied (Oct. 28, 1996). The Tennessee courts' upholding of this provision requiring accountability of the board members to the voters in their districts demonstrates that the State legislature embraces, and the Tennessee state courts uphold, school district by school district representation rather than insisting upon county-wide representation. This is authority directly in conflict with Petitioner's argument that Tennessee has declared or would declare the relevant geopolitical entity to be the entire county.

REASONS FOR DENYING THE WRIT

This Court should refuse to grant certiorari in this case. The Sixth Circuit, in its original opinion and again in denying the petition for rehearing *en banc*, considered all issues raised here by Petitioner. The decision of the Sixth Circuit is not in conflict with any decision of this Court. There is no division among the circuits concerning any matter raised in the Petition.

This is not, as Petitioners contend, a case in which residents of a voting district are being disenfranchised. Petitioners begin from an invalid premise. They take the position that the entire county, including the City of Memphis, comprises the district which must be analyzed for purpose of application of constitutional principles of enfranchisement. *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), and the Sixth Circuit's opinion herein, decided that issue correctly. The Sixth Circuit Court of Appeals properly used as touchstones in its decisions pronouncements of this Court in voting rights cases, and properly concluded that the relevant geopolitical entity (for purposes of the presumption of enfranchisement in a county school board election) is the district served by the county school board rather than the entire county.

Tennessee law requires that *counties* maintain public school systems, not cities. Tenn. Code Ann. § 49-1-102(c). The only reason the residents of the City of Memphis are not a part of the district which votes in County school elections is that they choose to be a part of a separate school system within the Memphis city limits, which is empowered to raise funds for its separate school system under Tenn. Code Ann. § 49-2-401. The Petitioners conceded below that a municipal or special school system may dissolve itself and turn over the administration of its schools to the county without any action of the Legislature or the consent of the county school board or county residents

outside the city. Tenn. Code Ann. § 49-2-1002. City residents will not be voting in the county school board election only because they have set up their own system (in which county residents outside the city limits cannot vote for school board members). Their *choice* to maintain their own school system has simply taken them out of the relevant geopolitical entity.

I.

THE RELEVANT GEOPOLITICAL ENTITY IS THE SCHOOL DISTRICT, NOT THE ENTIRE COUNTY.

Defendants are incorrect in their assertion that the Sixth Circuit rejected Tennessee state law's selection of the relevant geopolitical entity "without analysis." (Pet. at 11). To the contrary, the Sixth Circuit's decision meets that issue directly and holds that *even* if the correct interpretation of Tennessee's Constitution requires that local school board members be elected county-wide, the state Constitution must "give way to the requirements of the Supremacy Clause when there is a conflict with the federal Constitution." (Pet., Appendix at 11), citing *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

A. No conflict among the circuits nor any ruling of this Court requires the grant of certiorari in this case.

Petitioners urge this Court to reverse the Sixth Circuit's definition of the relevant geopolitical entity for the purpose of the one-person, one-vote analysis in school district cases. However, there have been no inconsistent decisions of this Court nor of any other Circuit Court of Appeals which would justify or mandate review by this Court. In fact, the definition of the relevant jurisdiction in *Duncan* and in the case at Bar is consistent with decisions in every Circuit which has considered this issue. *See Locklear v. North Carolina State Board of*

Elections, 514 F.2d 1152 (4th Cir. 1975); *Davis v. Linville*, 864 F.2d 127 (11th Cir. 1989); *Hosford v. Ray*, 806 F. Supp. 1297 (S.D. Miss. 1992). In *Locklear*, a North Carolina statute permitted city school district voters to vote for county school district board members. The court of appeals held that the appropriate standard was "whether a compelling state interest justifies **permitting** residents of City School units to participate in the election of these seven members of the county school board." *Locklear*, 514 F.2d at 1159. The Fourth Circuit held that the inclusion of city school district voters unconstitutionally diluted the county school district residents' votes. *Id.* In *Davis*, an Alabama statute permitted city residents to vote for the county superintendent of education. The court, following the precedent established by four previous cases[1] decided by the Eleventh Circuit over the prior thirteen years, focused upon whether the inclusion of out-of-district voters was permissible, finding that "the inquiry, in essence, is whether city residents have a substantial interest in the election of county education officials." 864 F.2d at 129. The *Davis* court held that inclusion of city school district voters in that case was permissible since there was no voter domination, city residents funded county schools, and there were considerable student cross-overs. *Id.* In *Hosford*, pursuant to Miss. Code Ann. § 37-5-71, city school district voters were permitted to vote for the county school district superintendent. The court's analysis focused upon whether including city voters was proper since:

> Settled case law teaches that electors residing in a municipal separate school district may cast their vote for a county office, such as a county superintendent of education, or for the county board of education,

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1. *See Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976); *Phillips v. Andress*, 634 F.2d 947 (5th Cir. Unit B Jan. 22, 1981); *Hogencamp v. Lee County Board of Education*, 722 F.2d 720 (11th Cir. 1984); *Sutton v. Escambia County Board of Education*, 809 F.2d 770 (11th Cir. 1987).

> if the resident municipal electors have a substantial interest in the operation of the county school district.

806 F. Supp. at 1303. The court held that the inclusion of city school district voters violated the equal protection rights of the county school district residents. *Id.* at 1307. In all of these cases, the courts analyzed whether *including* voters who resided outside the relevant jurisdiction (the school district) was proper. Petitioner has cited no federal authority for the proposition that the relevant jurisdiction is the entire county.

Since the relevant geographic jurisdiction in this case is the Shelby County School District, the issue presented to the Sixth Circuit was whether the inclusion of out-of-district voters impermissibly diluted the voting strength of the voters residing within the district. Petitioner's reliance upon *Evans v. Cornman*, 398 U.S. 419 (1970), for the proposition that out-of-district voters should be included in the Shelby County School District elections is misguided. In *Evans*, the State of Maryland was attempting to exclude certain residents of the state from voting in state elections. Whether the government may exclude a resident within the relevant jurisdiction is subject to a strict scrutiny analysis. *Id.* at 422. Determining whether a state may properly expand the voting franchise is a completely different issue than determining whether a state may properly disenfranchise voters within the relevant jurisdiction.

B. Tennessee state law does not suggest a need for a grant of certiorari.

The rulings of the Sixth Circuit in this case and in *Duncan*, as well as the rulings of the Fourth and Eleventh Circuits are in conformity with the holding of *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), which Petitioner apparently misconstrues to stand for the proposition that federal courts must

accept as the relevant geopolitical entity whatever the state considers to be the relevant geopolitical entity. In *Holt Civic Club*, residents outside the city argued that they should be entitled to vote in city elections because certain city powers affected them. This Court held that "a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68-69. The parties in *Holt* never disputed that the "governmental unit" was the city; therefore, the Court never addressed the issue of whether it should give deference to the state's definition of the relevant geographic jurisdiction.

In *Duncan*, the Sixth Circuit pointed out that the dispute there was "between two 'co-equal' political entities, the Tullahoma School District and the Rural Coffee County School District." 69 F.3d at 94. There is a Coffee County School District, just as there is a Shelby County School District. Both of these districts are fully recognized by the state and state funding goes to these entities. (R. 68, Ex. 4, Aff. of Ernie Carter ¶¶ 2, 5). The Shelby County School District, in fact, serves residents of Shelby County outside of Memphis and it is required by law to do so. (R. 66, Stipulation of Facts ¶ 6). Shelby County School District board members have no county-wide authority, jurisdiction or responsibility. (R. 35, Ex. 1, Aff. of James Anderson ¶ 3). The Coffee County School District does not include the City of Tullahoma and the Shelby County School District does not include the City of Memphis. (*Id*). By enacting Tenn. Code Ann. § 49-2-201(c) (which mandates that school board members reside within the area served by the school district), the Tennessee legislature recognized the school district as the appropriate geopolitical entity for representation purposes.[2] In *Duncan*, as in this case, the dispute is directly related to the

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2. Under the Plan declared unconstitutional, District Six would have had no voters residing within the Shelby County School District. As a result, a candidate for the District Six position could not reside within District Six. As a further result, the candidate would not be able to vote in the very election in which he or she is running.

school district, not the county. Therefore, the relevant geopolitical entity is the school district, not the county at large.

Even assuming, *arguendo*, that the District Court and Sixth Circuit should "give deference" to Tennessee law construing the appropriate geopolitical entity, Tennessee law does not clearly indicate that the entire county is the relevant jurisdiction in this case. Petitioners argued before the Sixth Circuit that under Tennessee law "the jurisdiction of the county school board is the same as it is for all county offices — it is the entire county." (Original Appellate Brief of Petitioners at 18). The Petitioners listed the county offices elected by the county at large such as judges, court clerks, sheriff and property assessor. (*Id.* at 7, n.4). In all of these instances, the officer serves all residents of Shelby County. The Shelby County School Board is the only office argued by Petitioners to be a "county office" which only serves a portion of the county. (*Id.* at 18). It is far from clear under Tennessee law that the Shelby County School Board is a county office. In *Southern v. Beeler*, 195 S.W. 2d 857 (Tenn. 1946), whether the Knox County Board of Education was a county office was never at issue. The court stated that "it is conceded by counsel for defendants that the Board of Education of Knox County and the county superintendent of schools are county officers." *Id.* at 864. The court held that since the board members were conceded in that case to be county officers, the entire county was entitled to vote. *Id.* at 864-65. The Tennessee Constitution does not actually provide that county school boards must be elected by the entire county.[3]

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3. The Tennessee Constitution provides at Article XI, Sec. 17, "No county office created by the Legislature shall be filled otherwise than by the people or the county court." The Constitution does not define the term "county office." The issue of whether the Shelby County School Board members are "county officers" is a facts and circumstances inquiry. *Williams v. Cothron*, 288 S.W. 2d 698, 700 (Tenn. 1956). In particular,

(Cont'd)

When the petition for rehearing en banc was denied by the Sixth Circuit, Judge Merritt filed a separate concurring opinion in which he agreed with Respondents' position that Tenn. Code Ann. § 49-2-201(c) is evidence that the Tennessee legislature knew that some heavily populated counties in the state have a municipal as well as a county school board, and "enacted subsection (c) to ensure that members of county school boards like Shelby County's would live in the county outside the city, the area served by the county school board." (Pet., Appendix at 60-61). Judge Merrit also correctly pointed out that the decision in this case is unlikely to result in a multiplicity of similar suits because:

> Among Tennessee's large counties, Shelby County is the only one facing this problem. Nashville has a consolidated metropolitan government, while Knoxville, Jackson, and Chattanooga have all surrendered their school charters to their respective counties.

(Pet., Appendix at 61).

Petitioners have provided no justification for the reversal of the relevant geographic jurisdiction holding in *Duncan* and in this case. There have been no decisions of this Court which would mandate a reversal. All of the other federal circuit courts

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(Cont'd)
the court will not concern itself with the name of the position created, but whether it was the legislative intent to create a county office. *Id.* As noted by the Petitioners, the EIA simply provides that "there shall be a board of education elected by the people." Tenn. Code Ann. § 49-2-201. The Tennessee statute could reasonably be interpreted to mean that the board of education be elected by the people served by the school district. The legislature did not define whether the Board of Education is a county office.

which have addressed this issue have construed the relevant geographic jurisdiction as the school district. Petitioners cite no contrary federal authority for the proposition that the relevant jurisdiction is the county at large.

II.

KRAMER v. UNION FREE SCHOOL DISTRICT, 395 U.S. 699 (1969) DOES NOT STAND AS AUTHORITY FOR THE GRANT OF THE FRANCHISE TO OUT OF DISTRICT VOTERS.

Kramer v. Union Free School District, 395 U.S. 699 (1969) has no application to this case at all except insofar as it is additional support for the rights of residents of the area served by the Shelby County School Board to exercise the franchise unimpaired by the vote dilution which is proposed by Petitioners.

The law struck down in *Kramer* prevented residents *in the district*, not residents from outside of the district, from voting in the district's school board elections unless they owned real property in the district, or were parents/guardians of the children enrolled in public schools. Petitioners fail to state that the *Duncan* court discussed *Kramer* and *distinguished* it from the facts in *Duncan*, so clearly as to find that it must be evaluated under a different standard. The *Duncan* court noted that the Plaintiff in *Kramer* lived in the relevant geographic area and that "it is now beyond challenge that a person living in the relevant geopolitical entity has a strong claim to the franchise." 69 F.3d at 93. Petitioners' argument concerning *Kramer* is premised upon the assumption that the relevant geopolitical entity is the entire county, including areas not served by the county school board. Any analysis that is not grounded on the fact that the relevant geographical area is the area served by the Shelby County School System is based upon an erroneous premise and is, therefore, also inherently erroneous.

Petitioners cite *Avery v. Midland County*, 390 U.S. 474 (1968), as affirming the right of city residents to vote in county elections even though county residents might have a greater interest in county governmental decisions. (Pet. at 16-17). This is basic. City residents vote in county elections for all county officials who have county-wide authority and jurisdiction. In fact, city residents vote in the election of the Shelby County Commission, which among its other duties, approves the budget of the county school system and provides the tax revenues which support it. Actually, city residents can and do elect a majority of the County Commission. (R. 66: Stipulation ¶ 42). Through that County Commission, they have a crucial voice in the operation and financial support of the system. Budgetary control is ultimate control. Thus, city voters have a majority representation in the body which makes these vital decisions. Only operations, curriculum and staffing decisions are in the control of the Shelby County School Board, which is the only political body which would be elected solely by the residents of the Shelby County School District. It is easy to foresee a situation in which the city resident dominated Shelby County Commission would deny funds to the Shelby County School system in order to utilize those funds for other county-wide services in which city residents have a direct interest. The stipulation of facts clearly states that city residents do not provide financial support for the county schools. In fact, the opposite is true. County residents provide such support for city schools. (Pet., Appendix at 37). Justice requires that those citizens who are directly served by the county school system have a political entity which is concerned solely and directly with their educational system to address their needs and concerns.

The Tullahoma residents in *Duncan* did not reside in the relevant geopolitical entity, but instead lived in the adjacent political jurisdiction called the Tullahoma School District. After noting that persons living in the relevant geopolitical entity have

a strong claim to the franchise, the *Duncan* court emphasized that the Supreme Court has held that "a government unit may legitimately restrict the right to participate in its political processes to those who reside in its borders." *Id.* at 93 (quoting *Holt*, 439 U.S. at 67). Because the Tullahoma residents, like the Memphis City residents in this case, and unlike the plaintiff in *Kramer*, do not live in the relevant geopolitical entity, the constitutionally protected right to participate on an equal basis with other citizens in the relevant geographic area applied in *Kramer* has no application, just as it had no application in *Duncan*. *Id.*

Petitioners' entire argument is premised upon the assumption that the relevant geopolitical entity for purposes of county school board elections is the entire county rather than the county school district. This is contrary to the ruling of every federal circuit which has considered the issue. Moreover, Tenn. Code Ann. § 49-2-201(c), which recognizes the school district as the relevant geopolitical entity for purpose of candidate residency requirements, has been tested and upheld by the state courts of Tennessee. The Sixth Circuit was correct in its ruling.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEWIS R. DONELSON
Counsel of Record
ROBERT MARK GLOVER
BAKER, DONELSON, BEARMAN
& CALDWELL
Attorneys for Intervenor Respondents
Herman Cox, et al.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000